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Policing Hatred: Police Bias Units and the Construction of Hate Crime

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Much of the scholarly debate about hate crime laws focuses on a discussion of their constitutionality under the First Amendment. Part of a larger empirical study of police methods of investigating hate crimes, this Note attempts to shift thinking in this area beyond the existing debate over the constitutionality of hate crime legislation to a discussion of how low-level criminal justice personnel, such as the police, enforce hate crime laws. This Note argues that, since hate crimes are an area in which police have great discretion in enforcing the law, their understanding of the First Amendment and how it relates to their job is important to the impact that hate crime legislation has in the community. Additionally, research on the enforcement of hate crime laws may inspire further investigation of the broad discretion police officers currently possess in all areas of law.

September 12, 1912, Willie Perkins of Sheffield, Alabama, a man described as being "of excellent character," was walking peacefully along a railroad when a party of White men set upon him for no apparent reason, chased and hounded him; and finally murdered him. A grand jury decided not to make an indictment for the murder.[1]

On November 13, 1988 in Portland, Oregon, a group of skinheads in the White Aryan Resistance movement attacked three Ethiopian immigrants. Amidst shouts of "Fuck you, niggers" and "Go back to your own country," the men were viciously kicked and beaten with a baseball bat until one man, Mulugeta Seraw, collapsed and died.[2]

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1. *See Lynched "For Being Black,"* MONTGOMERY ADVERTISER, September 12, 1912, *cited in* RALPH GINZBERG, 100 YEARS OF LYNCHINGS 77 (1988).

2. *See* MORRIS DEES & STEVE FIFFER, HATE ON TRIAL: THE CASE AGAINST AMERICA'S MOST DANGEROUS NEO-NAZI 3–7 (1993) (detailing the crime and the trials that followed).

INTRODUCTION

Although these cases both involve the selective hunting and killing of Black men, they differ in one important respect—the second was a bias crime and first was not. Bias or hate crime[3] legislation mandates a penalty for the selection of a victim based on specific prejudices, especially race, religion, ethnicity or sexual orientation.[4] If the first incident had been prosecuted the perpetrators would, in all likelihood, have been charged with murder, thus potentially subjecting them to the maximum penalty allowable. In other words, the killers, identified by a witness as Walt Miller, Tom Mason, C.L. Baker, Jack Purser, George Stidham and others, could have received the same sentence for Willie Perkins' murder as they could have for killing a family member, a business partner, or a neighbor. Their targeting of Willie Perkins would have played no part in either the crime with which they were charged or the penalty to which they were sentenced. The second crime, on the other hand, is categorized as a bias crime. Oregon instituted a bias crime law in 1981.[5] The suspects in the second crime, charged with violating the statute, were sentenced to twice the maximum allowable penalty that they would have received had they killed a White relative or business partner under similar circumstances.

Though bias-motivated incidents like the killing of Mulugeta Seraw are rooted in the nation's origins, spanning the arrival of Columbus and the legacy of slavery and beyond,[6] it is only in the last two decades that attempts to mitigate bias-motivated hatred have actually identified targeted groups, condemned crimes motivated by certain types of prejudice, and prescribed punishment that exceeds the penalty for similar crimes not motivated by the delineated prejudices. During the 1980s, several states passed laws punishing crimes motivated by bias, ranging from cross-burning statutes to penalty-enhancement laws.[7] Congress passed the Hate Crime Statistics Act[8] in 1990 which required the FBI to collect yearly statistics on bias crimes from law enforcement agencies around the country. According to the most recent FBI report in 1994,

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3. Hate crime literature uses both "hate" and "bias" to describe crimes motivated by a variety (including racial, religious, ethnic, and sexual orientation) of prejudices. In this Note, I will use "hate crime" and "bias crime" interchangeably.

4. The actual prejudices proscribed vary by statute. See discussion *infra*, Part II.

5. OR. REV. STAT. § 166.165 (1995).

6. *See* MICHAEL NEWTON & JUDY ANN NEWTON, RACIAL AND RELIGIOUS VIOLENCE IN AMERICA: A CHRONOLOGY (1991) (describing incidents of racial and religious violence occurring on United States soil since the European discovery of the New World).

7. For a description of statutes, see *infra*, Part II.

8. Hate Crime Statistics Act, 23 U.S.C. § 534 note (1993), *as amended by* Act of July 3, 1996, Pub. L. No. 104-155, § 7, 110 Stat. 1392, 1394 (1996).

approximately 7400 law enforcement agencies identified a total of 5932 incidents as hate crimes.[9]

Public awareness that incidents may be hate crimes stems not only from legal developments that created the category of bias-motivated violence, but also from police acknowledgment of the bias motivation behind particular criminal acts. To charge individuals under most bias crime statutes, police and prosecutors must produce evidence of bias motivation because many hate crime statutes require that hate crimes be motivated in part by a proscribed hatred.[10] Therefore, bias crimes exist only when the predicate offense, that is, the underlying crime, is combined with a bias motivation. As is the case in most other crimes—murders, burglaries, rapes—it is the police who are responsible for investigating and later identifying and classifying bias crimes. The job of classifying or identifying—naming—in this area is a weighty task. Because most bias-motivated incidents are placed first in other crime categories, bias crimes do not legally exist until the police say they do.

Enforcing bias crime legislation would be much easier if identifying bias crime were like identifying homicide.[11] When the police find a body, so long as they can determine that the individual's death was not due to natural causes, accident, or suicide, they can be fairly certain that a homicide has occurred. While both the type of homicide and the degree may be in doubt, homicide is the only way to classify the death of one person caused by another. Identifying bias crime is more complicated than identifying homicide on two levels: the factual and the political. Often the only evidence of the requisite criminal intent is bias-motivated speech, the punishment of which raises First Amendment issues. The First Amendment complicates officers' tasks by requiring them to decide whether words uttered during or prior to the commission of a crime are constitutionally protected speech or evidence of unlawful motivation that can be criminalized under bias crime statutes.

First Amendment issues aside, bias crime classification and identification can be a difficult task. While assigning bias motivation is simple in the two examples with which this Note began, other

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9. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIMES STATISTICS 5 (1994).

10. *See* N.Y. CIVIL RIGHTS LAW § 40-c(2) (McKinney 1992); COOK COUNTY STATE ATTORNEY'S OFFICE, *A Prosecutor's Guide to Hate Crimes*, at IV-2 (1994).

11. The Model Penal Code defines homicides as the killing of one human being by the act, procurement, or omission of another. MODEL PENAL CODE § 210.1 (1962). A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being. *Id.* Criminal homicide within criminal codes includes murder, manslaughter or negligent homicide. *Id.* Homicide, however, is not always a crime.

cases are much more challenging. All too often incidents that may be bias-motivated involve contested stories requiring the police to "solve" the crimes. Consider the following case from New York City:

> On Friday, December 8, 1995, a young man with a revolver walked into Freddy's Department Store on 125th in Harlem and began shooting. As store employees ran for cover, the gunman spayed the store with a flammable liquid. While the store burned, the gunman shot himself. Eight people, including the gunman, died in the incident.[12]

As New Yorkers struggled to explain this tragedy some called it the work of a crazy man; others, a bias crime.[13] To some, labeling this a bias crime makes sense in light of what they consider the relevant circumstances—that the perpetrator was Black, that the owner of the store was Jewish, that Black-Jewish relations have declined since the accidental death of a young Black child was followed by the killing of a Jewish student, and finally that the Reverend Al Sharpton was picketing Freddy's in support of a Black-owned store. Those who dismiss racial animosity as the motivation for the crime say there was no connection between Sharpton, the landlord-tenant dispute he was protesting, and the gunman.[14] With the gunman dead the motivation for the crime is unknown, and classification of the incident stems only from the perspectives of those classifying it. The New York City police, charged with upholding both the First Amendment and New York's bias crime statute, could not afford to rely on the quick judgment of lay persons.

Concerned with the front lines of hate crime legislation implementation, this Note argues that police must sort through the ambiguity and grapple with difficult First Amendment questions to identify hate crime laws. This Note examines how the police use official procedure and everyday practices to negotiate the murky waters of the First Amendment. In doing so, this Note asserts that hate crimes exist not only because perpetrators commit them but also because they are "recognized" by particular police behavior predicated on organizational procedure, environmental conditions (*e.g.*, the political nature of the bias crimes), victims' and perpetrators' stories, and police routines. Part I of this Note discusses the statutory terrain of hate crime legislation that supplies the legal mandate for police action. Part II surveys the constitutional literature on bias crimes that addresses the First Amendment questions

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12. For a description of this incident see, Robert D. McFadden, *Giuliani and Bratton See Racism in Harlem Fire*, N.Y. TIMES, Dec. 10, 1995, at A1.

13. *See* Carey Goldberg, *Neighbors Play Down Race, Seeing "Act of a Crazy Man,"* N.Y. TIMES, Dec. 10, 1995, at 20.

14. *Id.*

arising out of bias crime legislation. Part III addresses the question of how organizational theorists have addressed actors' decision making within organizations. Part IV focuses on the issue of individual-level decision making in the literature on police discretion in treatment of the law. The Note concludes in Part V with a brief discussion of the implications of police construction of hate crime.

I. THE LEGAL TERRAIN: A BRIEF OVERVIEW OF HATE CRIME LEGISLATION

Although there is no commonly agreed-upon definition of bias crimes,[15] they generally consist of violence, threats of violence, and harassment motivated by prejudice.[16] This prejudice is based on the actual or perceived race, religion, ethnicity or sexual orientation of the victims. Often bias crimes are committed by a member or members of one race, religion, ethnicity, or sexual orientation against a member or members of another.[17] Murder, non-negligent manslaughter, forcible rape, aggravated and simple assault, intimidation, arson, destruction, and damage or vandalism of property can all be hate crimes if they manifest the requisite intent.[18]

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15. *See* Valerie Jenness & Ryken Grattet, *The Criminalization of Hate: A Comparison of Structural and Polity Influences on the Passage of "Bias-Crime" Legislation in the United States*, 39 SOC. PERSP. 129, 130 (1996).

16. *See, e.g.*, CENTER FOR DEMOCRATIC RENEWAL, WHEN HATE GROUPS COMES TO TOWN: HANDBOOK OF EFFECTIVE COMMUNITY RESPONSES 61 (1992) (defining hate crime).

17. Groups classifying hate crimes deal with the exceptions to this general rule (minority groups members who commit intra-group crimes and majority groups members who are victims) differently. For example, even though the vast majority of anti-Semitic crimes are committed by non-Jews, the Anti-Defamation League (ADL), a group that monitors anti-Semitic violence, asserts that, barring evidence of mental disturbance or an indication that the dispute was of a purely personal nature, bias crimes committed by Jews against other Jews would be considered as such and included in the Audit of Anti-Semitic Incidents. ANTI-DEFAMATION LEAGUE, AUDIT OF ANTI-SEMITIC INCIDENTS 23 (1993). Similarly, it was not until 1990 that Southern Poverty Center's *Klanwatch Intelligence Report* included bias crimes committed against Whites who were not Jewish; the list of hate crimes from 1980–1989 includes only crimes committed by Whites against "minorities, Jews and gays where there is evidence of bias motivation." *See* SOUTHERN POVERTY LAW CENTER, KLANWATCH INTELLIGENCE REPORT 47 (1989).

18. *See generally* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS (1994) (collecting hate crime statistics for murder, forcible rape, aggravated assault, simple assault, intimidation, robbery, burglary, etc.).

A. *The Origin of Hate Crime Legislation: The Klan Act and Federal Civil Rights Legislation*

One of America's earliest attempts at proscribing racially motivated violence was the Ku Klux Klan Act passed by Congress in 1871.[19] Designed to combat the Ku Klux Klan's racially motivated intimidation of Southern Blacks and voters, section 2 of the Act made it a federal offense to:

> conspire together, or go either directly or indirectly, in disguise upon the public highway or upon the premises of another for the purpose of depriving any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, for the purpose of preventing or hindering the constituted authorities of any state giving or securing to all persons within such state the equal protection of the law.[20]

The penalties for violating the Klan Act ranged from fines of $500 to $5000, imprisonment, or both, and civil liability to the injured parties.[21] Local resistance to Klan Act arrests and prosecutions combined with the inadequacy of federal enforcement resources undermined the effectiveness of the Klan Act; cases prosecuted under it yielded few convictions.[22] When the Justice Department was able to obtain convictions, Southern judges often meted out penalties inadequate to deter racially-motivated violence.[23]

After the Supreme Court nullified section 2 of the Klan Act in *United States v. Harris*[24] and *Baldwin v. Franks*,[25] other parts of the Act were incorporated into sections 51 and 52, and later, sections 241 and 242 of the Act.[26] The surviving remnants of the original

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19. 17 Stat. 13 (1871)

20. *Id.*

21. *Id.*

22. *See* Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870–1890*, 53 J. OF S. HIST. 421, 422 (1987) (describing a 28% percent conviction rate for cases prosecuted under the Enforcement Act between 1871–1884).

23. *Id.* (asserting that some jurors voted to convict because they knew that judges' penalties for Enforcement Act violations would be light); *cf.* ROBERT J. KACZOROWSKI, POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, THE DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876 54–55 (1989) (explaining that the Klan "paralyzed local government agencies" as many local officials were "members of the Klan and participated in their crimes").

24. 106 U.S. 629 (1883).

25. 120 U.S. 678 (1887).

26. 18 U.S.C. §§ 241, 242 (1996).

legislation include both criminal and civil provisions.[27] Section 241 prohibits two or more people from traveling in disguise on the highway, or onto the property of another, with intent to prevent or hinder a citizen's free exercise or enjoyment of any right or privilege.[28] In *United States v. Price*,[29] the Court affirmed that Fourteenth Amendment rights were included within the compass of section 241 and that private individuals could be prosecuted under it.[30] Klan members dressed in hoods and robes, who have attempted to deprive individuals of the free exercise of federal civil and political rights, have been prosecuted under this provision.[31] While these provisions were used during Reconstruction to prosecute those who interfered with exercise of the right to vote, now section 241 is generally used to prosecute those who prevent others from using public facilities[32]—those who try to prevent minorities from moving into all-White neighborhoods[33]—and those who impede the exercise of rights under the Fourteenth Amendment.[34]

Less explicitly tied to the terrorist actions of the Klan, sections 242, 245, and 247 protect the free and unrestricted exercise of several different federal rights. Section 242 enforces criminal penalties against those who, under "color of any law"—i.e. the real, purported, or claimed authority of any state or local law—deprive individuals of federal civil rights.[35] Enacted to prevent beatings by local sheriffs and law enforcement officers, section 242 was used successfully to convict two Los Angeles police officers who were videotaped beating Rodney King.[36]

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27. § 241.

28. *Id.*

29. 383 U.S. 787 (1966).

30. *Id.*; *see also* United States v. Guest, 383 U.S. 745 (1966) (affirming constitutionality of section 241 as applied to private individuals charged with criminal conspiracy to violate Black civil rights).

31. *See, e.g.*, Wilkins v. United States, 376 F.2d 552 (5th Cir.) (affirming conviction of Klan members for the murder of Viola Liuzzo), *cert. denied*, 389 U.S. 964 (1967).

32. *See, e.g.*, United States v. Greer, 939 F.2d 1076 (5th Cir. 1991) (affirming conviction for assault of non-White users of a public park).

33. *See, e.g.*, United States v. Stewart, 806 F.2d 64 (3d Cir. 1986) (affirming conviction for arson of home directed at Black residents and other Black citizens who were potential occupants of home); United States v. Wood, 780 F.2d 955 (11th Cir. 1986) (affirming conviction of Klan members for racially-motivated threats directed at maintaining all-White neighborhoods).

34. *See, e.g.*, United States v. Kozmininski, 487 U.S. 931 (1988) (affirming conviction under section 241 for holding a person in involuntary servitude).

35. 18 U.S.C. § 242 (1996).

36. CENTER FOR DEMOCRATIC RENEWAL, *supra* note 16, at 61; *see* Screws v. United States, 325 U.S. 91 (1945) (affirming the use of the precursor to section 241 in police brutality cases). Screws, the local sheriff, had a grudge against a theft suspect and after arresting him beat him to death with his blackjack. *Id.* at 92–93; *see also* Williams v. United States, 341 U.S. 97 (1951) (private detective with police badge acting under

Section 245 was enacted as part of the Civil Rights Act of 1968, as a response to retaliation against civil rights workers. Not solely limited to those actions done under the color of law, section 245 allows prosecution to proceed against those who, on account of a victim's race, color, religion, or national origin, interfere "by force or threat" with the exercise of specific federal rights, or in retaliation against those who exercise protected federal rights.[37] Among the federal rights protected are voting,[38] employment,[39] interstate travel,[40] serving as a juror,[41] receiving a benefit conferred by federal or state government,[42] attending school,[43] and enjoying public accommodations.[44] Section 245's broad scope has been used to prosecute those who might otherwise escape federal prosecution. For example, in 1984, supremacists David Lane and Bruce Pierce were prosecuted under it for the murder of Jewish talk-show host Alan Berg who made a practice of ridiculing hate groups on the air.[45]

Other sections of federal law used less frequently to prosecute hate crime are provisions that prohibit: 1) the willful interference with civil rights under the Fair Housing Act;[46] 2) the intentional interference by force or threat with the free exercise of religion;[47] and 3) the intentional defacement or attempted defacement, damage, or destruction of religious buildings or grounds.[48]

In 1994, Congress added penalty enhancements for hate crimes to the existing federal legislation. As part of the Violent Crime and Control Law Enforcement Act of 1994,[49] Congress passed provisions requiring the United States Sentencing Commission to create sentencing guidelines that enhance penalties for individuals convicted of hate crimes under federal civil rights law. The new guidelines are

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"color of law"); United States v. Price, 383 U.S. 787 (1966) (upholding indictments under sections 241 and 242 for individuals involved in the killing of civil rights).

37. 18 U.S.C. § 245 (1996).

38. § 245(b)(1)(A).

39. § 245(b)(1)(C).

40. § 245(b)(2)(E).

41. §§ 245(b)(1)(D), 245(b)(2)(D).

42. §§ 245(b)(1)(C), 245(b)(2)(B).

43. § 245(b)(2)(A).

44. § 245(b)(2)(F).

45. *See* United States v. Lane, 883 F.2d 1484 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990). The prosecutor in *Lane* argued that Berg's murder was motivated by his religion and his on-air comments and, therefore, interfered with his enjoyment of his employment as a radio talk-show host. *Id.* at 1496.

46. 42 U.S.C. § 3631(a) (1994) (prohibiting interference, intimidation and attempts to injure because of race, color, sex, or religion those who are or are attempting to sell, rent, or purchase dwellings).

47. 18 U.S.C. § 247(a)(2) (1996).

48. § 247(a)(1).

49. Violent Crime and Control Law Enforcement Act of 1994 § 280003, 28 U.S.C. § 994 (1996).

"Victim Related Adjustments" that allow the sentencing judge to increase a defendant's sentence in cases involving "hate crime motivation"[50] and "vulnerable victim."[51] Though the vulnerable victim (subsection (b)) and hate crime motivation (subsection (a)) adjustments are to be applied cumulatively, subsection (b) may not be applied in a case when the hate crime motivation adjustment also applies, unless the victim of the offense was unusually vulnerable for reasons unrelated to race, color, national origin, ethnicity, gender, disability, or sexual orientation.[52]

While federal laws have been used effectively in some cases, groups that monitor hate crimes insist that political considerations and the limited scope of federal hate crime law[53] severely restricts the number of situations in which they can be used. For example, under Republican administrations, the Justice Department has been reluctant to become involved in issues traditionally associated with minorities, civil rights, and governmental interference; thus, the use of federal hate crime legislation has waned.[54]

B. *State Hate Crime Statutes*

Perhaps as a result of the paucity of federal remedies or due to the fact that states generally have jurisdiction over criminal matters, the vast majority of bias crimes are prosecuted at the state level.[55] Almost all states have some type of hate crime legislation; either laws specifically enacted to combat hate crimes or additions to the

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50. U.S.S.G. § 3A.1.1(a) (1996). This section provides:

> If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion or national origin, ethnicity, gender, disability, or sexual orientation or any person, increase by 3 levels.

Id.

51. § 3A.1.1(b). This section provides: "If the defendant knew or should have know that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels." *Id.*

52. § 3A.1.1, comment, n.3.

53. These provisions generally only protect the exercise of rights guaranteed by federal law.

54. *See* JACK L. LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 182 (1993). Levin and McDevitt stated that, according to the Southern Poverty Law Center, between 1987 and 1989, the Bush Administration Justice Department prosecuted only 31 federal cases of racial violence, most of which involved housing discrimination. *Id.*

55. *Id.* at 186.

existing criminal and/or civil code.[56] Many states have penalty enhancement statutes that increase punishment for crimes motivated by bias[57] and statutes that prohibit threats, intimidation, and physical violence.[58] States have used anti-mask statutes, cross-burning statutes, and institutional vandalism statutes to prohibit interference with the free exercise of civil rights or prohibit action historically associated with racial violence.[59] A number of states have civil remedies that allow victims to sue for damages as well as injunctive relief regardless of whether the incident in question leads to a prosecution or not.[60] Some states also mandate sensitivity training for law enforcement officers,[61] hate crime data collection,[62] and education of perpetrators and the public.[63]

1. Anti-Mask, Institutional Vandalism, and Cross-Burning Statutes

One of the oldest forms of prohibition against bias-motivated violence at the state level, anti-mask statutes, federal legislation aimed at the Ku Klux Klan, generally penalize the wearing of a mask, hood, or disguise while in public or on the private property of another without permission.[64] Most anti-mask legislation was enacted in response to the terror caused by the hooded costumes worn by Ku Klux Klan and was passed in the 1920s or the 1950s, during

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56. LU-IN WANG, HATE CRIMES LAW 9-2 (1996) (hate crimes treatise providing an overview of hate crime legislation on state and federal level). Wang indicated that only Wyoming had no legislation specially relating to bias crime. *See id.* at App. B.

57. *See* ALASKA STAT. § 12.55.155(c)(22) (Michie 1996); CAL. PENAL CODE § 1170.75 (West 1996); 730 ILL. COMP. STAT. § 5/5-5-3.2(a)(10) (West 1996); N.C. GEN. STAT. § 15A-1340.16(d)(17) (1996).

58. *See* CAL. PENAL CODE § 11413(b)(9) (West 1996); MD. ANN. CODE OF 1957 ART. 27, § 470A(b)(3), (4); MASS. GEN. LAWS ch. 265, § 39 (1996).

59. *See, e.g.*, Hernandez v. Commonwealth, 406 S.E.2d 398, 401 (Va. App. 1991) (asserting "legislature's original motivation for enacting the anti-mask statute may have been to 'unmask the Klan' "); State v. Miller, 398 S.E.2d. 547, 550 (Ga. 1990) (maintaining the "statute was passed in response to need to safeguard the people of Georgia from terrorization by masked vigilantes").

60. *See* 720 ILL. COMP. STAT. § 5/21-1.2(a) (West 1996); LA. REV. STAT. ANN. § 9:2799.2 (West 1996); MASS. GEN. LAWS ch. 266, § 127A (1996); MO. ANN STAT. § 527.523 (West 1996).

61. *See* GA. CODE ANN. §§ 35-3-60 through 35-3-65.

62. *See* ARIZ. REV. STAT. ANN. § 41-1750.A.3 (West 1996); CAL. PENAL CODE § 13023 (West 1996); CONN. GEN. STAT. ANN. § 29-7m (West 1996); D.C. CODE ANN. § 22-4002 (1996).

63. *See* CAL. PENAL CODE § 422.95(b) (West 1996).

64. Generally statutes have exemptions for innocent activities such as wearing a mask as part of a holiday costume, for a masquerade ball, or for medical or safety reasons. WANG, *supra* note 56, at 11-5, § 11.02.

peak periods of Klan activity.[65] As of December 1996, seventeen states have anti-mask statutes.[66]

Institutional vandalism statutes, the most common type of state hate crime statute, prohibit vandalism and defacement of a variety of locations, including public monuments and institutions. Currently, thirty-six states have statutes prohibiting institutional vandalism.[67] Some were enacted during the 1960s in response to Ku Klux Klan harassment of Black political institutions and churches.[68] Subsequently-enacted statutes also prohibit the defacement of Jewish temples, community centers, and grave sites. Some state statutes are be based on the model legislation created by the Anti-Defamation League (ADL).

The burning of a cross, which originated as a signal from the Ku Klux Klan that a Black person was about to be murdered, is prohibited by law in twenty-one states.[69] Cross burning may be prohibited under several different types of statutes. It may also be prohibited by statutes that punish the action without requiring prosecutors to prove a specific level of intent. Other statutes forbid cross burning only if an individual intends to intimidate or interfere with the exercise of another's civil rights. Cross burning may also be prohibited under statutes that bar terrorist threats. Lastly, state statutes penalize cross burning under ethnic intimidation statutes.[70]

2. Bias-Motivated Violence and Intimidation Statutes

Thirty-five states have bias-motivated violence and intimidation statutes.[71] These statutes include one or more of the following elements: (1) criminalization of ethnic intimidation; (2) automatic enhancement of penalties for crimes motivated by forbidden prejudices; or (3) authorization of judicial discretion to increase penalties when the crime was motivated by a forbidden

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65. *Id.* at § 11.01.

66. *Id.* at App. B. (delineating state anti-mask statutes); *see* LA. REV. STAT. ANN. § 14:313. (West 1996); MICH. COMP. LAWS. ANN. §§ 750.217, 750.396 (West 1996); MINN. STAT. § 609.735 (1996).

67. WANG, *supra* note 56, at App. B-1 (delineating state institutional vandalism statutes); *see, e.g.*, WASH. REV. CODE ANN. §§ 9A.36.080(2)(b), 961.160-.180 (West 1996) ("[T]hreats to bomb or injure property[.]"); WIS. STAT. § 943.012 (1996) (criminalizing the vandalization of religious or other public institutional structures).

68. WANG, *supra* note 56, at § 11.01.

69. *Id.* at App. B (delineating state cross burning statutes). Most states also prohibit the burning of any other religious symbol. *See id.*

70. *Id.* at § 12.02; *see infra* Part I.A.b.

71. *Id.* at App. B. (delineating state bias-motivated violence and intimidation statutes); *see* WASH. REV. CODE. ANN. § 9A.36.080 (West 1996).

prejudice. Some states, including Oregon,[72] Michigan,[73] and New York,[74] have based their statutes on a model created by the Anti-Defamation League. The four-part ADL model statute, created in 1981 to combat all types of hate crimes, has sections on institutional vandalism, intimidation, civil action for institutional vandalism and intimidation, and bias crime reporting and training for law enforcement personnel.[75] Bias-motivated violence and intimidation statutes generally have categories of "protected persons" or "protected status" that may not serve as the motivational element of the crime. Most statutes bar threats, harassment, assaults, and trespassing on account of a person's race, color, religion, or national origin. In addition, fourteen states include sexual orientation in the list of bias motivations; eleven states include gender. As of December 1996, eight states also had special punishments for crimes motivated by disability;[76] Iowa[77] included political affiliation and Iowa,[78] Minnesota,[79] Vermont,[80] and Washington, D.C.[81] also included age.

II. CONSTITUTIONAL AND POLITICAL DILEMMAS CREATED BY BIAS CRIME LEGISLATION

Despite the proliferation of hate crime legislation, bias crime statutes are a controversial means of combating racial violence. In

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72. OR. REV. STAT. §§ 166.155, 166.165 (1996).

73. MICH. COMP. LAWS ANN. § 750.147b (West 1996).

74. N.Y. PENAL LAW §§ 240.30, 240.31 (McKinney 1996).

75. The ADL's model Bias-Motivated Intimidation provision reads:

> 2. Intimidation
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> A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section ___ of the Penal Code [insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or any other appropriate statutorily proscribed criminal conduct].
>
> B. Intimidation is a __ misdemeanor/felony [the degree of criminal liability should be at least one degree more serious than that imposed for the commission of the offense].

ANTI-DEFAMATION LEAGUE, *supra* note 17, at 3.

76. WANG, *supra* note 56, at App. B (delineating intimidation statutes which proscribe disability as motivation).

77. IOWA CODE §§ 729.5, 729A.2 (1996).

78. *Id.*

79. MINN. STAT. ANN. § 609.2231 (West 1996).

80. VT. STAT. ANN. tit. 13, §§ 1454-55 (1995).

81. D.C. CODE ANN. § 22-4001, -4003 (West 1996).

courts of law and both inside and outside the circles of legal academe, laws that punish cross burning or that provide penalty enhancement for hate crimes have been hotly debated.[82] Critics of hate crime laws say they are unconstitutional,[83] while supporters insist they go to an examination of the offender's motive, something often a factor in criminal law.[84]

Perhaps bias crime legislation is so controversial because bias crimes place many between a theoretical rock and hard place. On the one hand, the random senselessness of bias-motivated violence horrifies many Americans. Particularly vicious bias crimes, such as the widely publicized setting afire of a Black tourist by White supremacists in 1993,[85] raise the specter of the Holocaust and Ku Klux Klan night rides that still linger in our national consciousness. On the other hand, however, many Americans feel that punishment of people for their beliefs, even if these beliefs constitute hatred, flies in the face of the ethic of toleration on which this country was founded. Some may draw the line where belief leads to action. The proper reply to this argument is that the founders of this country fought for the freedom to believe what one wants and the freedom to act on it, and this is what the Supreme Court has supported in a number of free speech cases in the last twenty years.[86]

Political objections to hate crime legislation, especially penalty enhancement laws, suggest that such laws violate American socio-political and legal norms. The socio-political critique often relies on the "sacredness" of American values like democracy or the great American tradition of political protest.[87] Typically, those who condemn hate crime legislation purport that condemning prejudice by having special penalties for even the most violent expression of "ideas" silences both bigots and dissidents.[88] Political "pluralism"

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82. *See generally Symposium: Demise of the First Amendment? Focus on Rico and Hate Crime Legislation—Shield from Terrorism? or National Gag Order?*, 21 OHIO N.U. L. REV. 831 (1995) (debating the constitutionality of hate crime legislation); *Symposium: Penalty Enhancement for Hate Crimes*, CRIM. JUST. ETHICS, Summer/Fall 1992 (discussing the benefits and disadvantages of creating hate crime legislation).

83. *See infra* note 95 and accompanying text.

84. *See infra* note 106 and accompanying text.

85. *See Hatred Turns Out Not To Be Color-Blind*, TIME, Jan. 18, 1993, at 22.

86. Examples of cases in which the Court has prohibited the unbridled government regulation of politically or socially unpopular ideas without compelling reasons include Texas v. Johnson, 491 U.S. 397 (1989) (flag burning case); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (civil rights case); Regan v. Time, Inc., 468 U.S. 641 (1984) (bringing suit against *Time* for reproducing U.S. currency on its cover).

87. *See* Jonathan Rauch, *In Defense of Prejudice: Why Incendiary Speech Must be Protected*, HARPER'S MAGAZINE, May 1995, at 37.

88. *Id.*; *see also* Susan Gellman, *Hate Crimes After* Wisconsin v. Mitchell, 21 OHIO N.U. L. REV. 863, 868 (1995) ("[T]he overarching, unifying theme of the Bill of Rights, especially the First Amendment, is the particular protection of dissent and non-

mandates that all ideas be heard.[89] It is only through free and open debate that bigotry withers, somewhat akin to short-necked giraffes succumbing to the process of natural selection.[90]

Critics of this political pluralism model to ending racism through free and open debate in the "marketplace of ideas" raise the point that bigoted ideas often have more influence than other views. Charles Lawrence III, who is tolerant of laws restricting racist speech, argues that the experience of Black Americans and other people of color has shown not only the tenacity of racism in the ideological free market, but also that "the idea of racial inferiority of non-whites infects, skews, and disables the. . . market. . . ."[91] According to Lawrence, racism is imbedded in culture to such an extent that we often do not recognize it.[92] Because of a menacing legacy of threats and violence, racist words and actions silence people of color. Thus, Lawrence argues, racism by its very nature does not allow the normal social intercourse necessary for the free exchange of ideas.[93]

Those who object to bias-motivated violence and intimidation statutes for constitutional reasons generally emphasize the evidentiary problem posed by the use of racist or other bias speech uttered by the defendant during the commission of the crime as evidence of bias motivation. Many of these critics premise their objection on the purported difficulty of disentangling criminal action from protected expression of speech[94] or thought.[95] Susan Gellman, a staunch critic

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conformity. That is why seemingly tenuously related concerns of religion, speech, press, assembly, and petition for redress do belong grouped together in the First Amendment. They all protect the one who disagrees, who is different, or who offends the majority, from the power of the majority and the state.").

89. *See* Barbara Dority, *The Criminalization of Hatred*, HUMANIST, MAY 1994, at 39 (criticizes hate crime laws on ground that "the cure for hatred . . . cannot be found through the police powers of the state . . . [but] lies in mind of a free people who suppress, without the aid of government, the liberty to reject it").

90. *See* Rauch, *supra* note 87, at 43. Rauch argues that since regulations permitting free speech protects bigots and dissidents alike, minorities have as much, if not more, to gain from free speech laws. *Id.* at 45. Not only are hate speech and hate crime legislation used against minorities disproportionately, such measures also send prejudice underground rather than eradicate it. *Id.* at 39. "Intellectual pluralism," Rauch contends, focuses not on "purists' " unrealistic vision of stamping out prejudice, but rather allows prejudice to be "managed." *Id.* at 38–42.

91. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT 53, 77 (Mari J. Matsuda, et al. eds., 1993).

92. *Id.*

93. *Id.* at 79.

94. There is general agreement that racist speech deserves protection. However, a significant minority of scholars argue that the First Amendment should but does not protect racist speech. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story in* WORDS THAT WOUND, *supra* note 91, at 17–51. Matsuda, like other critical race theorists, insists that truly racist speech can concretely be identified and separated from political speech. She defines racist speech as persecutory, hateful, and

of bias crime legislation, levels most of her criticism at the ADL model statute for bias-motivated intimidation. Gellman insists statutes based on the ADL model are so vague that it is nearly impossible to separate bias crimes from those not motivated by bias,[96] an infirmity which she insists violates the rule of *Grayned v. City of Rockford*,[97] in which the Supreme Court decided that such vagueness offends due process.[98] Evidentiary problems posed by what she believes to be the arbitrariness of racial epithets and the possibility of "multiple meanings" for a variety of racial slurs similarly disturb Gellman.[99] Other proof problems in the identification of bias motivation include the model statute's failure to specify a culpable mental state of the offender and vagueness in situations where motives are mixed.[100]

For First Amendment absolutists like Gellman who criticize bias crime laws, the main problem with classifying some crimes as bias-motivated and others as not bias-motivated is the legal system's inability to determine from an individual's words whether bias motivated the incident in question or whether the racist or other biased utterances stemmed from the individual's deeply held, politically unpopular, "biased" ideas, which provided no motivation for the

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pressed group. *Id.* at 36. Matsuda implies that the argument which insists that racist speech is indistinguishable from political expression is something of smoke screen. She alleges moreover that protecting free speech is a public choice that symbolizes the value that is placed on people of color in the society. "The places where the law does not go to redress harm have tended to be the place where women people of color and poor people live." *Id.* at 18. Sanctioning racial bias makes the statement that the victims of racist speech are valued members of our society. *Id.*

95. *See* Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 349 (1991); *see also* James Morsch, Comment, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivations*, 82 J. OF CRIM. L. & CRIMINOLOGY 659, 671 (1991) (arguing prosecutors are prohibited by the First Amendment from using the accused's beliefs because liberal admission may chill freedom of expression).

96. Gellman, *supra* note 95, at 356. Attempting to complicate the process for identifying bias-motivated incidents, Gellman suggests atypical examples which will fall within the ambit of the bias crime statutes, even though the alleged perpetrators had benign motives. In her "hard case," involving a "racial champion," White woman A who, hearing another White woman B, calling C, an African American child, a racist name, threatens B in an attempt to protect C. *Id.* at 356–57. Evidently, Gellman feels that in practice there will be ambiguous cases similar to this one which the model statute should theoretically protect, but which would probably end up falling through the cracks.

97. 408 U.S. 104 (1972).

98. Gellman, *supra* note 95, at 355; *see also* Phyliss B. Gerstenfeld, *Smile When You Call Me That!: The Problems with Punishing Hate Motivated Behavior*, 10 BEHAV. SCI. & L. 259, 274–76 (1992) (describing challenges made by defendants in Oregon, Minnesota, and Ohio to hate crimes statutes for vagueness and overbreadth).

99. Gellman, *supra* note 95, at 355–56.

100. *Id.* at 356–57.

crime.[101] When the speaker's words are used as evidence of an element of the offense, these writers argue that the illegal conduct being punished consists solely of the actor's bigoted sentiments, something they consider not only to violate the First Amendment but also to chill the expression of "biased" ideas.[102] Using a slippery slope analysis, First Amendment absolutists see bias crimes as leading to "thought crimes."[103]

Those who maintain that bias crime legislation is constitutional generally do so on two slightly contradictory grounds; the first is that most bias crime laws do not implicate the First Amendment,[104] and the second is that even if bias crime legislation does regulate expressive conduct, it does so permissibly.[105] The first argument, that bias crime statutes do not implicate the First Amendment, highlights what their defenders consider bias crime statutes to prohibit. Bias crime statutes, these writers maintain, prohibit hate violence which they emphatically declare is *not* speech.[106] In the wake of *R.A.V. v. City of St. Paul*,[107] in which the Supreme Court invalidated a city hate crime ordinance, many are quick to acknowledge some constitutional limitations on state regulation of bias-motivated conduct, but they distinguish hate violence from cross burning which they view as *inherently* a form of political expression.[108] Hate

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101. *Id.* at 359; *see* Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 30.

102. Gellman, *supra* note 95, at 359–61.

103. *Id.* at 382.

104. *Cf.* Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 675, 711 (1993) (arguing that "[r]acially-targeted behavior that vents the actor's racism . . . is racial speech that is protected by the First Amendment").

105. Shirley S. Abrahamson et al., *Words and Sentences: Penalty Enhancement for Hate Crimes*, 16 U. ARK. LITTLE ROCK L.J. 515, 526–27 (1994) (arguing that Wisconsin's penalty enhancement statute punishes acts, not beliefs, and that the "statute does nothing more than *assign consequences* to invidiously discriminatory acts") (emphasis in original); *see also* Richard Cordray, *Free Speech and the Thought We Hate*, 21 OHIO N.U. L. REV. 871, 873 (1995) (distinguishing hate crimes from that hate speech laws on the grounds the hate crimes laws that target the actual "act" of intentional selection at the root of hate crimes).

106. *See* James Weinstein, *First Amendment Challenges to Hate Crime Legislation: Where's the Speech?*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 7; *see also* Abramson, *supra* note 105, at 527 ("[T]he only chilling effect [of Wisconsin's penalty enhancement statute] is on lawless *conduct*.") (emphasis in original); Lawrence, *supra* note 104, at 696 ("Enhancing a criminal sentence for any 'hate crime' . . . in no way creates a "thought crime" or penalizes anyone's conduct based on a non-proscribable viewpoint or message that such conduct contains or expresses.").

107. 505 U.S. 377 (1992).

108. Weinstein, *supra* note 106, at 12; *see* Jonathan David Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crime Statutes After* R.A.V., 72 OR. L. REV. 157, 168 (1993).

violence, they argue, is conduct that compares with prostitution,[109] but contrasts with conduct such as wearing a jacket that says "fuck the draft"[110] or burning a flag.[111] Many argue that placing hate-motivated violence with prostitution is appropriate because, unlike the latter two actions, hate violence is not commonly undertaken to communicate any type of message; "it is more assault than a political statement."[112]

Those who find many hate crime statutes constitutional also roundly criticize Gellman and other scholars who equate hate crimes statutes' enhanced penalties with the punishment of racist or unpopular *thoughts* and beliefs. In their critique they point to the widespread use of motive in the criminal law[113] as an aggravating factor in death penalty cases.[114] Looking to the civil context, proof of motive is also crucial in anti-discrimination law.[115] Critics often insist

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109. The Supreme Court has not extended First Amendment protection to prostitution. *See* Acara v. Cloud Books, Inc., 478 U.S. 697, 702 (1986) (declaring prostitution occurring in N.Y. book store closed by state officials manifests absolutely no element of protected expression).

110. Cohen v. California, 403 U.S. 15, 16 (1971) (ruling that jacket with "fuck the draft" did not constitute "fighting words" and defendant could not be prevented from exercising his First Amendment right to wear it).

111. Texas v. Johnson, 491 U.S. 397 (1989) (declaring flag burning as a protected form of expression under the First Amendment).

112. Selbin, *supra* note 108, at 169.

113. Jeffrie G. Murphy, *Bias Crimes: What Do Haters Deserve?*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 20–22. Murphy also supplies a normative reason that motive is used as an aggravating factor in criminal law. He maintains that criminal law would more than likely lose society's respect if it did not at least in some ways track "our moral intuitions about desert." *Id.* at 21 (using Justice Holmes' analogy that even a dog recognizes and cares about the difference between being kicked on purpose and being tripped over accidentally). For human beings who are complex social beings who deeply rely on symbolic communication, there is a great impetus to punish hate crimes as vehicles for the transmission of degrading and humiliating messages. *Id.* at 22–23; *see also* Selbin, *supra* note 108, at 177 (arguing that "[h]ate crimes are qualitatively different events than ordinary criminal acts . . ." and "hate violence infects human communities in a dramatic fashion and threatens their very survival"); Weinstein, *supra* note 106, at 8 (explaining that a retributivist views racial violence as "inherently more reprehensible because of the racial motivation" and a legal moralist finds that "society regards racial violence as especially reprehensible").

114. *See* Dawson v. Delaware, 503 U.S. 159 (1992) (finding that the introduction of the defendant's membership in a racist organization during sentencing was not contrary to his First Amendment rights); Barclay v. Florida, 463 U.S. 939 (1983) (holding that the trial judge's comparison of Barclay's act to the judge's personal experience with Nazi concentration camps in World War II was valid in sentencing determinations). Murder for profit is another example. *See* Lawrence, *supra* note 104, at 717; Weinstein, *supra* note 106, at 8.

115. *See* Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) (holding that even if plaintiff proves defendant's articulated reason was pretext, defendant may still be required to prove intent to discriminate); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (holding that plaintiff bears burden for proving employer's articulated reason was pretextual).

that scholars like Gellman place too much emphasis on the distinction between motive and intent.[116] While intent concerns the mental state provided in the definition of an offense in order to asses the actor's culpability with respect to the element of the offense, and motive concerns the cause that drives an actor to his purpose, the distinction between the two is a fine one and the decision as to what constitutes each will vary depending on the act being criminalized.[117]

Frederick Lawrence insists that a better way of thinking about motive that dramatizes the distinction between hate crime and hate speech is to view motive in bias crime cases as part of a two-tier system.[118] Under this system, Lawrence argues that prosecutors must prove two essentially unrelated *mens rea* elements: the first applicable to the parallel crime, *i.e.* the intent to commit assault; and the second, demonstrating that the accused was motivated by bias in the commission of the parallel crime. Therefore, racist speech, which lacks the recklessness, knowledge, or purpose to commit a parallel crime, cannot be prosecuted under bias crime laws.[119]

In *U.S. v. O'Brien*,[120] the Court devised an approach to evaluate whether statutes permissibly regulate expressive conduct. There, the Court found that even if a court determines bias-motivated conduct contains elements of expressive speech implicating the First Amendment, such conduct does not necessarily merit First Amendment protection.[121] *O'Brien* required the regulation: 1) be within the constitutional power of the government; 2) further an important or substantial government interest; 3) be unrelated to the suppression of free expression; and 4) have incidental restrictions on the alleged First Amendment freedoms that are no greater than what is essential to further the state interest.[122] Defenders of hate crime laws argue that under the state's delegated power to pass laws protecting the health, safety, and welfare of its citizens, state legislatures may clearly criminalize violent conduct.[123] To satisfy the second prong of the test, defenders of the laws insist the government's compelling interest in suppressing hate crime is

116. Murphy, *supra* note 113, at 21.

117. Lawrence, *supra* note 104, at 720–21.

118. *Id.*

119. *Id.* at 699.

120. 391 U.S. 367 (1968).

121. O'Brien, 391 U.S. at 376 (holding that, in actions combining speech and non-speech elements, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedom). O'Brien had been convicted for burning his draft card on the steps of a federal courthouse in violation of an amendment to the Selective Service Act which prohibited draft card mutilation. *Id.* at 369.

122. *Id.* at 377.

123. Selbin, *supra* note 108, at 176.

justified by the intense danger to the communities they pose.[124] Finally, many in this camp argue that the third and forth prongs of the test are satisfied since the laws are aimed at hate-motivated violence, not the expression of hatred, so states' interest in promoting expression is unrelated to the suppression of expression, and ample opportunities[125] exist for people to express their hatred.[126]

A. *United States Supreme Court*

Over the past four years, the Supreme Court has shifted back and forth the boundaries within which states may regulate bias-motivated hatred. In a landmark bias crime statute case handed down in 1992, *R.A.V. v. City of St. Paul*, the Court demanded the even-handed treatment of all crimes regardless of bias[127] and, in doing so, supported the idea that actual hate crimes are difficult to identify because they are so closely linked to politically protected speech. The case concerned the conviction of Robert Viktora who was prosecuted under the St. Paul Bias Motive Crime Ordinance[128] for burning a cross on the front lawn of a Black family. Relying on the Court's decision in *Chaplinsky v. New Hampshire*,[129] the plaintiffs in *R.A.V.* argued that cross burning was a form of "fighting words."[130] In interpreting the ordinance, the Minnesota Supreme Court had declared the ordinance to reach only the expressions of

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124. *Id.* at 177, 180 n.79 (citing National Institute Against Prejudice and Violence data showing: 1) hate crimes more often occur as serial incidents; 2) hate crime victims are more traumatically effected; and 3) hate violence causes parallel psychophysiological and behavioral damage to the victim's community as well); Weinstein, *supra* note 106, at 9 (listing credible reasons for increased penalties for perpetrators of bias-motivated violence: 1) legal, moral, and retributivist justification for heightened reprehensibility of racial violence; 2) racial violence hurts victims and their community more than other types of violence; and 3) racial violence has ramifications for society as a whole).

125. Selbin, *supra* note 108, at 181 (arguing that bias crimes statutes do not prohibit expression of hatred).

126. *Id.*

127. 505 U.S. 377, 396 (1992).

128. ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990). It provided:

> Who ever places on public or private property a symbol, object, appellation characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

129. 315 U.S. 568 (1942). *Chaplinsky* defined "fighting words to mean words which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572.

130. *R.A.V.*, 505 U.S. at 381.

fighting words within the meaning of *Chaplinsky*.[131] Reversing the state high court, the Supreme Court extended constitutional protection to cross burning, arguing that by not criminalizing *all* so-called fighting words, the Minnesota statute was clearly attempting to isolate certain words based on their political content.[132] Calling such treatment "viewpoint discrimination,"[133] Justice Scalia insisted that "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow the Marquis of Queensberry rules."[134] The Court rejected the city's desire to communicate to the minority population its condemnation of the message in bias-motivated speech as insufficient to justify a content based ordinance.[135] Although the Court found St. Paul's interests compelling, it deemed the ordinance not reasonably necessary, maintaining that "[a]n ordinance not limited to the favored topics...would have had the same beneficial effect."[136]

Less than one year later, apparently in light of much confusion in the state high courts on the constitutionality of penalty enhancement statutes similar to Wisconsin's,[137] the Court elected to rule on another bias crime case, *Wisconsin v. Mitchell*,[138] a case in which, ironically, a Black man was the defendant.[139] In this case, after viewing the movie *Mississippi Burning*, Todd Mitchell, a Black man urged a group to attack a 14 year-old White youth.[140] Mitchell was convicted under the Wisconsin hate crime statute[141] and his two-year sentence was doubled. The Wisconsin law, based on the ADL model statute, provided that the penalty for crimes against people or property be increased if the victim or object has been intentionally selected "in whole or in part because of the actor's belief or perception regarding the [victim's] race, religion, color, disability, sexual orientation, national origin or ancestry...whether

131. *See* Matter of Welfare of R.A.V., 464 N.W.2d 507, 510–11 (Minn. 1991).

132. *See R.A.V.*, 505 U.S. at 391.

133. *Id.*

134. *Id.* at 392.

135. *Id.*

136. *Id.* at 396.

137. For evidence of the confusion, see, e.g., State v. Plowman, 838 P.2d 558 (Or. 1992) (upholding Oregon statute); State v. Wynant, 597 N.E.2d 450 (Ohio App. 1992) (striking down Ohio Statue); State v. Mitchell, 485 N.W.2d 807 (Wis. 1992) (striking down Wisconsin statute), *rev'd* Wisconsin v. Mitchell, 508 U.S. 476 (1993).

138. 508 U.S. 476 (1993).

139. According to the FBI, the majority (approximately 57% in 1994) of hate crimes are committed by White persons. Critics of hate crime legislation use the fact that a Black man is the defendant to argue that these laws will be used in differential prosecution. *See* Gellman, *supra* note 95, at 387.

140. 508 U.S. at 479–80.

141. WIS. STAT. § 939.645 (1996).

or not the actor's belief or perception was correct."[142] Mitchell challenged his conviction on First Amendment grounds arguing that the Wisconsin statute was overly broad. He alleged that providing for enhanced penalties whenever a defendant intentionally selects victims on the basis of race violates defendants' free speech rights.[143]

When the case was appealed to the U.S. Supreme Court, the Court relied on *Barclay v. Florida*[144] for the proposition that judges may consider racial motivation in sentencing.[145] In doing so, the Court upheld the view popular among hate crime law supporters by avowing that the defendant's motive for committing a bias crime can be identified and separated from issues of constitutionally protected political expression. The Court's ruling in *Mitchell* affirmed that punishing a criminal because of his selection of the victim based on bias or other hatred does not violate a defendant's free speech rights. The ruling also gave broad support for two important ideas: 1) that violence is neither speech nor expressive conduct protected by the First Amendment;[146] and 2) the State of Wisconsin's desire to prohibit bias-motivated conduct does serve as an adequate explanation justifying limits on one particular type of speech (*i.e.*, racist, anti-religious, anti-gay, lesbian and bisexual) over others.[147]

B. *Policing Free Speech or Enforcing Bias Crime Legislation?*

Though the constitutional sanction offered by the courts for laws like Wisconsin's appears to have settled the constitutional debate on the validity of hate crime legislation, for those charged with the initial identification and classification of the crimes, declaring the laws to be on sound constitutional grounds solves some[148] but not all problems. Hate crimes remain difficult to enforce for several reasons. Because motivation is an element of the crime and most hate crime statutes contain no definition of what constitutes evidence of bias-motivation, hate crimes are difficult to prosecute. Bias

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142. *Id.*

143. 508 U.S. at 481.

144. 463 U.S. 939 (1983). The defendant and others in *Barclay* were attempting to start a race war through the indiscriminate murder of White people. *Id.* at 942. The sentencing judge kept the racial motivation under consideration as an aggravating factor in determining whether to impose the death penalty. *Id.* at 948.

145. 508 U.S. at 486.

146. *Id.* at 484.

147. *Id.* at 488.

148. There is some evidence that the police pay attention to the Supreme Court's judgment of the constitutionality of bias crime laws. *See, e.g.*, Katia Hetter, *Enforcers of Hate-Crime Laws Wary After High Court Ruling*, WALL ST. J., Aug. 13, 1992, at B1 (describing law enforcement officials as wary about enforcing hate crime laws after Supreme Court's decision in *R.A.V. v. City of St. Paul*).

motivation, according to the constitutional literature, is a complicated matter about which the police receive no statutory guidance.[149] In New York, for example, the legal motivation for police identification and classification of bias crimes comes from just two sections of the Penal Law that criminalize bias crime.[150] The statutes criminalize actions entered into because of race, color, religion, or national origin[151] but supply no procedure for identifying motivation or criteria for acceptable evidence of motivation.

The lack of procedures and criteria for the legal evidence of bias motivation would not be a problem were it not so difficult to identify bias motivation. There is at least one serious problem associated

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149. James B. Jacobs, *Rethinking the War Against Hate Crimes: A New York City Perspective*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 55, 56 (describing motivation as complicated and at minimum encompassing ideas about unconscious as well as conscious desires).

150. For aggravated harassment in the second degree, the statute provides:

> A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she:
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> 1. Communicates, or causes a communication to be initiated by mechanical or electronic means or otherwise, with a person anonymously or otherwise, by telephone, or by telegraph, mail or any other form of written communication, in a manner likely to cause annoyance or alarm; or
>
> 2. Makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication; or
>
> 3. Strikes, shoves, kicks or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion, national origin of such person.

N.Y. PENAL LAW § 240.30 (McKinney, 1996). For aggravated harassment in the first degree, the statute provides:

> A person is guilty of aggravated harassment in the first degree when with intent to harass, annoy, threaten or alarm another person, because of the race, color, religion, or national origin of such a person he:
>
> 1. Damages premises primarily used for religious purposes, or acquired pursuant to section six of the religious corporation law and maintained for the purposes of religious instruction, and the damages to the premises exceeds fifty dollars; or
>
> 2. Commits the crime of aggravated harassment in the 2nd degree in the manner proscribed by the provisions of subdivision three of section 240.30 of this article and has been previously convicted of the crime of aggravated harassment in the second degree.

N.Y. PENAL LAW § 240.31 (McKinney, 1996).

151. Sexual orientation and disability are two categories that the police in New York classify as hate crime despite their absence from the Penal Law. NEW YORK CITY POLICE DEP'T, *Background Information on the Bias Incident Investigation Unit*, at 1 (unpublished document on file with the author).

with identifying bias motivation, similar to one identified in the constitutional literature—the difficulty of separating bias crimes from protected speech. In New York, the need for police officers to be wary of free speech when identifying and classifying was dramatized in a 1990 Departmental legal bulletin that discussed *People v. Dietze*,[152] a case in which the New York Court of Appeals reversed a lower court conviction and struck down a section of the penal law on the grounds that it criminalized free speech. Jackie Dietze was convicted of calling a woman she knew to be mentally disabled "a bitch," her son a "dog," and for threatening to "beat the crap out of" the woman "some day or night in the street."[153] The Court of Appeals overturned Dietze's conviction under subdivision 2 of the Penal Law § 240.25, which prohibited the use of obscene language or gestures in public with an intent to harass, annoy, or alarm, and struck down the statute as unconstitutionally vague.[154] The court said that on the facts there was no evidence that Dietze's shouts were a serious threat, and declared that unaccompanied by an act, the slurs did not constitute anything more than a "crude outburst."[155] In a memo to patrol officers, the Police Department attempted to reconcile the ruling in *Dietze* with New York law still on the books by holding that such outbursts made *again and again* would violate the city's hate crime law.[156]

While there may be no inherent difficulty in identifying bias crimes, as free speech absolutists suggest, separating bias crimes from free speech may at the very least require police officers to make extremely fine legal distinctions, a job that may require a clear understanding of the vagaries of First Amendment jurisprudence. In addition, police officers' jobs are often complicated by the lack of public understanding about what bias crime laws prohibit.[157] In Edison, New Jersey, Police Chief Edward Costello complained about people who wanted the police to make arrests when a group of anti-Semites began leafleting the City. He protested:

> [T]he Constitution is a very powerful document and it grants people rights, very broad rights, in the area of the First Amendment. It is the leafleting that has been the problem. They have a right to express their views, as un-

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152. 549 N.E.2d 1166 (N.Y. 1989).

153. *Id.* at 1167.

154. *Id.* at 1169.

155. *Id.* at 1170.

156. NEW YORK CITY POLICE DEP'T, OFFICE OF THE DEPUTY COMMISSIONER-LEGAL MATTERS, Legal Bureau Bulletin, Feb. 16, 1990, at 3 (unpublished document on file with author).

157. *See* Linda Bean, *Prosecuting Bias Cases: A Delicate Balancing Act*, N.J. L.J., Sept. 27, 1993, at 4.

> pleasant as those view may be. It is an emotional issue more than an intellectual issue, but the criminal law is limited in what it can do. We can punish conduct, but we can't punish speech.[158]

This assumes that the distinction between hate crimes and hate speech is as simple as the mere difference between speech and conduct. However, *Chaplinsky v. New Hampshire*[159] and *United States v. O'Brien*[160] suggest that expressive conduct may also have First Amendment protection.

Police officers' task may be further complicated because all bias crimes do not share the same type of motivation. Experts who study hate crime perpetrators have identified four different types of hate crimes: those motivated by resentment, those done for the thrill of it, reactive have crimes, and mission hate crimes.[161] Hate crimes motivated by resentment are increasing in popularity as downward mobility in the 1980s led many bigots to look for someone on which to blame for their misfortune.[162] Those who commit hate crimes "for the thrill of it" perform utterly random attacks for the enjoyment and exhilaration of making individuals suffer.[163] "Reactive" hate crimes are motivated by the personal threat posed by outsiders' entrance into a previously homogenous area.[164] Finally, the rarest type of hate crime, "mission" hate crimes, often perpetrated by members of organized hate groups, are characterized by a desire to rid the world of all members of a particular group.[165] In the perpetrator's mind, members of the targeted group are subhuman and must be eliminated to prevent them from destroying the perpetrator's culture, economy or purity of racial heritage.[166] Levin and McDevitt argue that Jews, gays and lesbians, and racial and ethnic minorities are often the victims of these crimes because the culture of hate prevalent in society tells perpetrators these groups are acceptable to blame for one's problems and are socially acceptable to victimize.[167]

Levin and McDevitt maintain that law enforcement officers must learn that a successful investigation will depend on the type of hate crime committed.[168] For example, a hate crime motivated by

158. *Id.*
159. 315 U.S. 568 (1942).
160. 391 U.S. 367 (1968).
161. *See* Levin & McDevitt, *supra* note 54, at 49, 65, 75, 89.
162. *Id.* at 49–53.
163. *Id.* at 65.
164. *Id.* at 75.
165. *Id.* at 89.
166. *Id.*
167. *Id.* at 30–31, 48–49.
168. *Id.* at 173.

excitement is likely to be perpetrated a group of young, White men without criminal records who live in a different area from the one in which the crime occurred. By contrast, perpetrators of reactive crimes, whose bigotry is more likely to be known, tend to live in the same area in which the crime was committed.[169]

Identifying bias motivation can be further complicated by the victim's behavior and the inability to use victim testimony as a reliable account of the event that transpired. Bias crime identification may be slowed by victim's refusal or inability to recognize that a hate crime has occurred.[170] Victims may often look to reasons other than their membership in a particular group to explain their victimization because if their attack was based on their group identity, they can do nothing to reduce their chances future victimization.[171] The typical problems with victim accounts[172] take on heightened importance when the perpetrator's motivation is a crucial element.[173]

In the final analysis, bias crime is an issue marked by serious disagreements even among right-minded individuals.[174] Saddled with the task of identifying and classifying these crimes, the police are often forced to make decisions about whether incidents are hate crimes or "ordinary crimes." Part III discusses social construction of organization theory to suggest how the police may make these decisions.

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169. *Id.*

170. *Id.* at 171.

171. *Id.* at 171–72.

172. For example, he or she may be mistaken, hold personal biases that affect his or her judgment, and he or she may have misperceived the incident and may not be able to give a reliable report.

173. *See* James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366, 384 (1996); *see also* Susan E. Martin, *Investigating Hate Crimes: Case Characteristics and Law Enforcement Responses*, 13 JUST. Q. 455, 469 (1996) (reporting that "victims of bias crime reacted more strongly to their victimization than did victims of comparison crimes").

174. *See* discussion *supra* Part II. *The Hartford Courant* reported a case in which a group of lesbians were sitting in their apartment when a man on the sidewalk began shouting, "Dykes get out" and "No more lesbians in Madison." Ellen Nakashwa & Marisa Osrio Colon, *State's Hate Crime Law Brings Few Convictions*, HARTFORD COURANT, July 19, 1993, at A1. He then began to throw beer bottles at them, dislocating one woman's jaw. *Id.* Though Wisconsin has a hate crime law, the man was not charged with a hate crime. *Id.* The State Attorney justified the inapplicability of the law, insisting the women (who had traded obscenities with the man and thrown a bag of trash at him) were not intimidated. *Id.* Moreover the assistant state attorney said that while the defendant's language was uncouth, it was not enough to prevail under the statute. *Id.*

III. DECISION MAKING AND SOCIAL CONSTRUCTION THEORY WITHIN ORGANIZATIONS

Social construction theory appreciates the ambiguities involved in police interpretation of the law. Social construction theory, as defined by Peter Berger and Thomas Luckmann, strives to understand and explain the processes through which social actors come to view situations as real. It posits that reality is constructed though the experience of every day life, especially everyday routines.[175] Berger and Luckmann assert that institutions have a role in organizing these routines.[176] "Institutions...by the very fact of their existence, control human conduct by sectioning up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible."[177] Law as an institution is well-suited to Berger and Luckmann's social construction analysis. Like other institutions, law clearly has a historical process; the parts of the common law in use today represent the codification of habitual, reciprocal action among individuals many generations ago.[178] Penalties imposed for different crimes acknowledge the problematic nature of proscribed and legitimate action. Assigning penalties for legally proscribed conduct, law accomplishes another task of organizations, it controls human behavior with preordained modes of behavior that channel conduct in a single direction. Many generations after the crystallization of law as an institution and its presentation to us as a set of undeniable facts, we have been socialized into our roles as citizens under the law. Law's place in the polity has also been legitimized; legal principles embodying the law of tort, for example, integrate concepts of duty and responsibility outside of the law. Finally, law is integrated with other aspects of social reality.

Berger and Luckmann's analysis can be equally applied to hate crime legislation, as a category of laws that have been specifically created through historical, political, and social processes. Moreover, hate crime laws mandate that penalties are to be applied differently to different socially constructed groups, groups that Berger and Luckmann would argue do not require differentiation—or that are not inherently different—but that society created out of its need for

175. PETER L. BERGER & THOMAS LUCKMANN, SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE 19–23 (1967) (offering theory that reality, or that which we cannot wish away, is socially constructed and thus can be understood by studying the processes through which knowledge is created).

176. *Id.* at 54.

177. *Id.* at 55.

178. *See id.* at 54.

order.[179] The concept of roles and the social distribution of knowledge partially explains individual disagreement within the criminal justice system over what constitutes free speech and what constitutes hate crime. A society's stock of knowledge is structured into categories defining what is relevant to the specific roles individuals play.[180] Individuals' roles mediate the common stock of knowledge, and they are inducted only into special areas of socially objectivated knowledge.[181] This implies that the job of hate crime classification gives police specialized knowledge that theorizing about constitutional issues may not.

Structuration and practice theories suggest how individuals within organizations develop specialized knowledge. Contrary to approaches that view individuals as passive recipients of social forces or institutions, structuration theories view individuals as actors who know about social institutions and whose knowledge of those institutions is highly relevant to their actions.[182] Envisioning a reciprocal relationship between individual action and social institutions, structuration theories strike a balance between the socially unencumbered vision of individual action in rational choice models of individual behavior, and the purely structural top down approaches in which individual structure *determines* individual behavior. Structuration theories and practice theories posit that actors are not cultural dupes yet they cannot completely control their effect on social institutions. Day-to-day routines constitute the social institutions the actors had no part in bringing about.[183]

Giddens' description of the relationship between system, structure, and structuration is one of complex interaction in which social systems are composed of regularized relationships between individuals or practices.[184] Systems have structural properties that are produced and reproduced via the application of rules and resources to power.[185]

Applying structuration to police identification and classification of bias crimes, routines—the everyday practices police officers employ—help police negotiate myriad incidents of complex racial conflict, religious conflict and other conflict. As outsiders of the victim's and perpetrator's community, police use these routines to classify what is socially constructed and contextually situated as a racial or religious incident. This "view from nowhere" demands

179. *See id.* at 51–52.
180. *Id.* at 76.
181. *Id.*
182. ANTHONY GIDDENS, THE GIDDENS READER 152 (Philip Cassell, ed., 1993).
183. *Id.* at 141.
184. *Id.* at 118.
185. *Id.*

objectivity in its search for "truth" and may also, over time, expose the investigator to the subtleties of racial perspective and incidents poorly captured by the hate crime label—expletives screamed in anger that surprise the perpetrator as much as victim or bigoted remarks that will never be hate crimes. A large part of police practice involves interpreting the stories told by victims and those told by suspects and situating those stories into a legal framework. This is no less true of bias crime investigation when police have the job of weighing the stories told by would-be suspects and victims in order to discern whether the incident described by the victim fits into the narrow legal category of bias crime.

Giddens' conception of power—the use of resources to secure outcomes leading to individuals' ability to intervene in events and alter their course—may encompass the organizational power police practices have on the structure of social hierarchy. Police practices regarding bias crime involve the power to name racial or social reality. Because American society no longer sanctions blatant expressions of racial violence, naming racial and social reality and defining what counts as racism becomes crucial to the social meaning of constructs like race and sexuality. The police's role as investigators and classifiers of hate crimes allows them to insert themselves into racial and other conflict and pass judgment on what has occurred. Police officers harness the power of the state, through either the investigation of White supremacists or through the characterization of other acts of bias-motivated violence, and thus acquire the power to define "real" racism, anti-Semitism, and homophobia.[186] Over time, in neighborhoods and small communities, if hate crime persists and police classification consistently favors one perspective over another, police actions may have the capability to alter the structure of social conflict and/or social interaction.

IV. POLICE AND THE ENFORCEMENT OF LAW

A. *Maintaining Order and Enforcing the Law*

Researchers have described police as "street-level bureaucrats."[187] Like many public servants, police officers interact directly with citizens and are responsible for the discretionary dispensation

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186. The power to define "real" racism is a significant one in a society that punishes racial discrimination and racial violence. For example, while racial intimidation is punished, non-racial intimidation has neither a social nor legal sanction. Defining racial intimidation or violence as non-racial increases its perpetrators' power by defining their actions as beyond the reach of the law. A full discussion of this issue is unfortunately outside the scope of this Note.

187. *See* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY at xi (1980).

of public services.[188] Because their day-to-day jobs are characterized by a high degree of discretion and autonomy in organizational activities, street-level bureaucrats can determine the amount and quality of benefits and sanctions to be dispensed to the public.[189] In this way, street-level bureaucrats are policy makers. Michael Lipsky insists that these jobs are marked by large amounts of discretion because society does not want the rigid application of rules in these positions.[190] While discretion creates flexibility, in environments with few controls, inadequate resources, and indeterminate objectives, how police officers manage conflicting goals is also political.[191] For police, the conflicting goals are whether to maintain order or enforce the law.

The tension between enforcing the law and maintaining order is well recognized in police-related scholarship.[192] "Law and order" implies rational restraint by the rules to achieve order.[193] In other words, it demands a rigid adherence to the rule of law, with conflicts and ambiguities resolved by consultation with the rules themselves. However, maintaining order in practice often requires police officers to be given discretion to make decisions and snap judgments based on their experience of what is required in particular situations.[194] For the police, considerations of utility may equal or

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188. *Id.* at 3.

189. *Id.* at 13.

190. *Id.* at 23.

191. *Id.* at 40.

192. *See generally* EGON BITTNER, ASPECTS OF POLICE WORK 19–28 (1990) (describing criminal law enforcement, regulatory control, and peacekeeping as overlapping domains of police work); PETER K. MANNING, THE NARC'S GAME: ORGANIZATIONAL AND INFORMATIONAL LIMITS ON DRUG LAW ENFORCEMENT 3–22 (1980) (illustrating narcotics laws' legal mandate that may be at odds with organizational aims); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 1–22 (1975) (discussing the tension between the rule of law and that which is necessary for the maintenance of order in a democratic society); JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR 17–34 (1978) (describing the problem of order in the police working environment).

193. SKOLNICK, *supra* note 192, at 10–11.

194. *See id.* at 186–202 (describing how police view the world in probabilistic terms); *see also* MANNING, *supra* note 192, at 79 (describing working agreements and arrangements made by narcotics officers that contrast with formal state procedures as attempts to deal with repeating ambiguities and problematic situations); WILSON, *supra* note 192, at 84 (describing the decision to arrest as the result of discretionary balancing of net gains and losses for all parties involved); Egon Bittner, *The Police on Skid Row: A Study of Peace Keeping*, 32 AM. SOC. REV. 699, 712 (1967) (describing the use of law to solve practical problems involved in keeping the peace on skid row); Richard J. Lundman, *Demeanor or Crime? The Midwest City Police-Citizen Encounters Study*, 32 CRIMINOLOGY 631, 647 (1994) (describing extralegal factors, such as demeanor which shape the police exercise of discretion); Robert E. Worden, *Situational and Attitudinal Explanations of Police Behaviors: A Theoretical Reappraisal and Empirical*

exceed in importance those of duty or morality, especially for less serious laws.[195] According to Robert Worden, theories of police behavior must:

> reflect the ambiguity and uncertainty of the task environment in which officers work, where formal and informal rules and procedures are in many cases vague and may even conflict, characteristics of the incidents into which they intervene may be variously interpreted, causal connection between actions and outcomes may be unclear, and the objectives toward which they are expected to direct their efforts are stated in general terms (if at all) and may be inconsistent.[196]

Their orientation as workers who wish to exercise initiative suggests the police are more likely to lean toward the arbitrary invocation of order to achieve what they perceive to be the substantive aims of the criminal law.[197]

Police have a duty to enforce the substantive law only when their behavior conforms to its procedural requirements.[198] *Total enforcement* of the law is thus precluded by due process and other procedural restrictions that ambiguously limit enforcement.[199] Empirical studies of the police have shown that policing is often extralegal, for while police officers may accept legal constraints, "they seldom invoke the law in performing police work; informal action, with or without coercive threats, is commonplace, and hence the dimensions of police discretion are not delineated only by officers' authority to apply legal sanctions."[200] In the absence of total enforcement, state statutes and local ordinances often impose on police officers *full enforcement* of the law, which includes: 1) investigation of all known violations of criminal law; 2) efforts to discover perpetrators of crimes; and 3) the presentation of evidence necessary for prosecutors to make their cases.[201]

Assessment, 23 L. & SOC'Y REV. 667 (1989) (describing the situational factors that have an effect on officers decisions to make arrests in traffic stops and disputes).

195. *See* JEROME SKOLNICK & JAMES FYFE, ABOVE THE LAW: POLICE AND THE EXCLUSIVE USE OF FORCE 90 (1993) (describing police culture as important to dealing with the police environment).

196. Worden, *supra* note 194, at 671.

197. SKOLNICK, *supra* note 192, at 9, 11; *see also* Bittner, *supra* note 194, at 711 (describing the use of law to keep skid row inhabitants from sinking deeper into their misery).

198. Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543, 554 (1960).

199. *Id.* at 554–55.

200. Worden, *supra* note 194, at 668.

201. Goldstein, *supra* note 198, at 559–60.

Though the law imposes full enforcement on police officers, they may be subject to informal organizational pressures and factors that provide incentives for minimal compliance with the law. Organizational forces, including procedures, rules and regulations, and training may discourage compliance; thus, police officers use their discretion to avoid full enforcement of the laws.[202] Police scholars have observed this decision not to invoke the law in areas such as writing parking and traffic tickets[203] and making arrests.[204] Unlike the decisions to invoke the law that get evaluated in criminal proceedings, it is widely accepted that decisions not to invoke the law are of low visibility[205]—they are not available for review either by the public or by superiors within the organizational structure.[206]

Police discretion runs from a variety of sources. Legislatures delegate discretion to the police through ambiguity in the law. Discretion also stems come from situational forces[207] or the police may create it themselves, in order to satisfy personal and institutional goals.[208] In the case of discretionary opportunities created within the law, researchers allege that police often infer lack of legislative desire for enforcement of the laws from statutes with ambiguous language, and in situations where it appears conduct has been proscribed: 1) to cure administrative enforcement problems;[209]

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202. Worden, *supra* note 194, at 673.

203. *See* SKOLNICK, *supra* note 192, at 73; WILSON, *supra* note 192, at 96–99.

204. WILSON, *supra* note 192, at 104 (circumscribed enforcement of vice arrests); Bittner, *supra* note 194, at 703 ("[N]ot to make an arrest is rarely, if ever, merely a decision not to act; it is most often a decision to act alternatively."). Such decisions not to invoke the law set the outer limits of law enforcement. *See* Goldstein, *supra* note 198, at 543.

205. *Id.*; *see also* Wayne R. LaFave, *The Police and Non-Enforcement of the Law—Part I*, 1962 WIS. L. REV. 104, 126–29 ("[E]ven repeated decisions not to invoke against particular conduct are apt to go unnoticed."); Worden, *supra* note 194, at 679 (decisions to write traffic tickets are low visibility).

206. Goldstein, *supra* note 198, at 552; *see also* Bittner, *supra* note 192, at 110 (contrasting the exhaustive review that follows the challenge of the applicability of legal norms by prosecutors to the total lack of review of police non-decisions).

207. *See, e.g.*, Worden, *supra* note 194, at 691 (describing factors like time of shift and amount of traffic which influence the amount of discretionary time in which to make suspicious stops).

208. SKOLNICK, *supra* note 192, at 73; *see also* AARON V. CICOUREL, THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE 323 (1968) (describing police officers' identification of juveniles as stemming from department policies organizational rules and codes).

209. Wayne R. LaFave, *The Police and Non enforcement of the Law-Part II*, 1962 WIS. L. REV. 179, 191. For example, vagrancy statutes, which prohibit "loitering about without any means of support," are used by the police for investigation of suspicious characters rather than for "bums," reflecting police uncertainties or restrictions in the law regarding the extent to which pre-arraignment detention for purposes of investigation is proper. *Id.* at 191–92.

2) to eliminate loopholes;[210] 3) to reflect the ideals rather than the immediate expectations of society;[211] or 4) because of legislative inaction.[212] In the case of ambiguous language, police are called to use their discretion to either defer interpretations of the law to other agencies, like prosecutors, or employ strict construction.[213] In the other categories, often in violation of the letter of the statute, police exercise their discretion, only invoking laws in the spirit in which they assume the laws were intended to be enacted; vagrancy laws may not be enforced against the homeless, gambling between friends may be allowed, few arrests will be made for adultery, and obsolete laws will not be enforced.

Police may also use discretion not to invoke the law because, within the institution, the logic of efficiency supports non-enforcement when limited resources are allocated to conduct considered more deserving of official action.[214] This may occur in cases of trivial deviations from the law when an officer believes that a warning will suffice.[215] Officers may choose not to enforce particular laws against subgroups in the community because the proscribed conduct is assumed to be normal.[216] Non-enforcement may be elected when the victim does not wish or refuses to aid in the prosecution of the crime. Officers use their discretion to avoid invoking the law when invocation might be inappropriate or unfair, when non-invocation protects public respect and support, when the cost to the criminal justice system of enforcement outweighs the

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210. *Id.* at 192–93. Included in this category are laws which criminalize gambling. *Id.* at 193. Gambling between friends in private residences is technically forbidden for fear that this loophole would regularly allow the guilty to escape. *Id.*

211. *Id.* at 197–99. Generally included in this category are morality and sexual misconduct laws. *See id.*; *see also* DAVID H. BAYLEY, FORCES OF ORDER 98–115 (1991) (discussing the police treatment of so-called "victimless crimes" like gambling, prostitution, the drinking of alcohol, pornography, and drug addiction).

212. *Id.* at 199. Obsolete laws and Blue laws fall into this category. *Id.*

213. *See* SKOLNICK, *supra* note 192, at 214. Skolnick asserted that police practices to circumvent the exclusionary rule suggest that there are two types of ambiguities; what constitutes a legal search and what practices will make behavior have the appearance of legality. *Id.* When the line between legality and illegality is fuzzy police justify a contention of legality regardless of the actual circumstances. *Id.* For a discussion of situational and attitudinal explanations of police behavior, see Worden, *supra* note 194, at 671.

214. *Id.* at 673.

215. LaFave, *supra* note 209, at 204; *see also* WILSON, *supra* note 192, at 84 ("[F]or most officers there are considerations of utility that equal or exceed in importance those of duty or morality, especially for the more common and less serious laws.").

216. WILSON, *supra* note 192, at 225–26, 297–99 (citing officers' belief that assault laws should not be enforced in the Black community because Blacks normally settle disputes violently). Wilson also finds a similar distributive injustice leading to non-enforcement among police officers. *Id.* at 37–39; *see* LaFave *supra* note 209, at 210.

benefits of non-enforcement[217] and when invocation of the law causes more harm to a victim and outweighs the loss sustained from the risk of non-enforcement.[218]

B. *Police Discretion and Hate Crimes*

Discretion is problematic in the hate crime context. First, street level enforcers of hate crime have the power to effectively nullify hate crime statutes through non-enforcement, thereby reducing them to an empty symbolic gesture.[219] Second, the most controversial use of police discretion has involved discrimination based on race, gender, and sexual orientation.[220] Thus, there is a legitimate cause for concern about the effective enforcement of bias crime laws designed to help these groups.[221] For hate crimes, non-enforcement of the law could be measured in one of two ways; either by identifying politically protected expression as bias crime (or evidence of bias motivation) or by failing to classify as bias crimes those which show bias motivation. It is in the latter area of much lower visibility that the literature on police discretion and non-enforcement of the law raises by implication several questions for the police enforcement of bias crimes law, especially in light of the ambiguity embodied in these laws.[222] Salient inquiries in this vein include the following: Are

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217. *See* SKOLNICK, *supra* note 192, at 125 (describing how police ignore narcotics informants' use of drugs because the benefits outweigh the cost of non-enforcement); *see also* Lundman, *supra* note 194, at 648 (noting a failure to enforce laws against public drunkenness and speeding because usually individual violators were a minor problem that would often correct itself). LaFave claimed that in some cases, such as instances in which subjecting conduct to the criminal process would be ineffective or inappropriate, the police would not fully enforced the law even if sufficient resources existed. LaFave, *supra* note 209, at 217–38.

218. WILSON, *supra* note 192, at 216–29.

219. *See* Samuel Walker & Charles M. Katz, *Less than Meets the Eyes: Police Department Bias-Crime Units*, 14 AM. J. OF POLICE 29, 32 (1995).

220. *Id.*

221. *Id.*

222. For a description of ambiguity in hate crime law and its impact on the police, see JAMES GAROFALO & SUSAN E. MARTIN, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, BIAS-MOTIVATED CRIMES: THEIR CHARACTERISTICS AND THE LAW ENFORCEMENT RESPONSE 49 (1993) (describing ambiguity inherent in those cases in which bias is a motivation); Alison Mitchell, *Police Find Bias Crimes Are Often Wrapped in Ambiguity*, N.Y. TIMES, Jan. 27, 1992, at B2; *Revision to Hate Crimes Law is Offered; But Debate Over Gays Might Kill Movement To Clarify Statute*, AUSTIN AM. STATESMEN, Apr. 2, 1995, at B1 (describing law enforcement officers' reluctance to use a "loosely defined" Texas hate crime law and chance having a conviction overturned on constitutional grounds); Rhonda Smith, *Protection from Hate Crimes on Gay Agenda*, AUSTIN AM. STATESMAN, Jan. 18, 1995, at B3 (describing a year old hate crime law that does not mention specific racial or minority groups and the difficulty in enforcing such an ambiguous law).

bias crimes an area in which police have discretion? If so, do they use it to not enforce the law? If the police do not enforce these laws, why not? For example, is bias crime legislation not enforced because statutory ambiguity leads police officers to think that bias crime laws are "feel-good" laws that legislators do not really want enforced? Is police non-enforcement localized and geared to certain situations (*e.g.*, cases involving violence against Asian Americans) that they feel are less of a problem in order to conserve scarce resources? Does victims' reluctance to prosecute play a role in the non-enforcement of hate crime legislation? Finally, do police pursue non-enforcement because they do not really think these actions are crimes? The empirical research on the police identification of hate crime provides answers to some of these questions.

The existing studies on police and bias crime suggest that this statutory ambiguity is often dealt with through specialization and development of elaborate procedure.[223] In what appears to be an extreme effort to comply with state laws, police departments around the country have devoted special units to bias crime investigation rather than not enforcing ambiguous bias crime laws.[224] According to the Justice Department's Bureau of Justice Statistics, there are over 350 specialized units devoted to bias crimes.[225] Similar to specialized units created to address enforcement problems, such as gangs, drugs, or vice, most of these units are responsible for investigating crimes that patrol officers have identified as possibly bias-motivated.[226]

In order to circumvent low-level enforcers' discretion in the classification of bias crime, many police departments have created standard operating procedures.[227] In most cases this means that all

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223. However, some laws may pose too many enforcement challenges. *See* sources describing the Texas hate crime law, *supra* note 222.

224. *See* Walker & Katz, *supra* note 219, at 29 (survey finding a variety of written procedures and organizational structures in departments reporting bias units to the Department of Justice in 1990).

225. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS, 1993: DATA FOR INDIVIDUAL STATE AND LOCAL AGENCIES WITH 100 OR MORE OFFICERS (1995) (survey of police departments with 100 officers or more that describes specialized units).

226. *See* Walker & Katz, *supra* note 219, at 30.

227. *See generally* Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 STAN. L. & POL'Y REV. 165 (1992/1993) (review of police bias crime procedures in Boston); Levin & McDevitt, *supra* note 54, at 166 (reviewing hate crime policy at the Baltimore County Police Department); Susan E. Martin, *A Cross-Burning is Not Just An Arson: Police Social Construction of Hate Crimes in Baltimore County*, 33 CRIMINOLOGY 303 (1995) (reviewing special bias crime procedures in Baltimore County, MD); Chuck Wexler & Gary J. Marx, *When Law and Order Works: Boston's Innovative Approach to the Problem of Racial Violence*, 32 CRIME & DELINQ. 205 (1986) (describing Boston's Community Disorders Unit).

uniformed members of the service are given special procedures to follow in the event that there are signs the crime they are investigating is bias-motivated. The procedures tell officers what to do and provides a list of suggested criteria designed to help officers discern whether a particular incident is motivated by racial, ethnic, religious, or any other element of a list of forbidden prejudices.[228] Though in most departments the suggested criteria is scarcely a formula or prolix code,[229] the use of these procedures suggests that those promulgating the rules believe that the procedures help officers separate bias from non-bias crimes.

In New York, if bias motivation is suspected, the officer is required to notify his patrol supervisor, the desk officer, and his commanding officer of the unit.[230] The commanding officer then decides whether the bias unit should investigate the crime. If the Bias Incident Investigating Unit is called in, the incident gets logged as a "possibly bias-motivated" incident.[231] The Bias Unit can either take control of the investigation or participate jointly with detective personnel in investigating the crime and making a definitive classification of the incident.[232] In the course of their investigation, officers interview eyewitnesses and victims, the perpetrator's family and check out his past affiliations. They will no doubt think about the day on which this crime occurred to see if it could have triggered bias-motivated violence. Police search the crime scene for clues to a perpetrator's motivation until they find anything that confirms or disproves the crime was racially motivated. For example, if police discover a perpetrator had prior connections to a racist organization, or if he acted differently toward the Black and White victims of the crime or said anything racist during the crime, this could serve as evidence that the crime was racially-motivated. Their investigation of bias crime requires police to weigh stories told by victims and those by perpetrators, sifting through different versions of an event colored by perspective, self-interest, anger, fear, and outrage. Like all police investigations, classifying bias crime is like putting together a puzzle, fitting each piece together into a recognizable picture.

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228. *See id.*

229. *See, e.g.*, NEW YORK CITY POLICE DEP'T, NEW YORK CITY PATROL GUIDE, at 108–26 (unpublished document on file with author) ("The mere mention of a bias remark does not necessarily make an incident bias-motivated just as the absence of a bias remark does not make an incident non-bias. A *common sense approach should be applied and the totality of the circumstances should be reviewed* before any decision is made.") (emphasis added).

230. Benjamin Ward, *The Police Response in New York City*, POLICE CHIEF, Dec. 1986, at 46.

231. *Id.*

232. *Id.*

The creation of specialized units and standard operating procedures like the above are designed to limit police discretion by providing a forum for internal review for the classification decision.[233] Many bias units have mechanisms for re-examining bias investigation and classification. In New York, for example, once the initial report has been made indicating that a crime may involve bias motivation, the failure to classify can be reviewed and reversed by unanimous decision of the Bias Review Panel that meets with the commander of the Bias Unit regularly.[234] In Baltimore, individual beat officers, precinct supervisors and Community Service Officers (CSOs) are all responsible for the investigation and classification of incidents motivated by race, religion and ethnicity.[235] Though their approach to classifying cases is somewhat decentralized, the department has devised two monitoring systems. First, all cases are reviewed and classified as verified, unverified or "unfounded" at monthly meetings attended by investigators and supervisors from the Community Relations Division, a representative from the state Human Relations Commission, the County Executive's minority affairs specialist and at least one precinct Community Service Officer.[236] There is also an internal monitoring system within the Community Relations Division which maintains close ties with the community and each precinct's CSO and is responsible for verification and statistical record-keeping.[237] It is important to note that, despite monitoring systems like those in New York and Baltimore, patrol officers' decisions not to classify incidents as bias crimes are unlikely to be reviewed except perhaps by the press.

Generally, empirical studies of police departments in the area of bias crime have summarized police procedures in the area of bias crime and compared the characteristics of bias and non-bias-motivated crimes.[238] Because it fails to examine how bias crime procedures work on the ground or how police actually implement the law, current bias crime research cannot address the critic's argument

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233. Brian Levin maintains that specialized units are created to take discretion away from patrol officers who are the least trained and most cynical about bias crimes. Levin, *supra* note 227, at 173. He cites a study done by Jack McDevitt in which only 19 of 452 crimes eventually classified as bias-motivated were reported as bias incidents by the responding officer. *Id.* He suggests large-scale misidentification by patrol officers results from their training to identify crimes based on the severity of the injury rather than underlying causes. *Id.*

234. Jacobs, *supra* note 149, at 57.

235. Martin, *supra* 173, at 461.

236. *Id.* at 462.

237. *Id.*

238. *See generally* GAROFALO & MARTIN, *supra* note 222 (examining New York City and Baltimore County police department practices in the area of bias crime and describing the nature of bias-motivated crimes vis à vis "other" crimes and basic law enforcement procedures, including response to victims).

regarding the highly subjective nature of bias crime classification and, consequently, the possibility that police discretion may allow the police to intrude on politically protected rights.

Current police bias crime practices must be studied to define properly the impact of hate crime legislation. The level of discretion in identification and classification of hate crimes differs substantially from discretion in other areas in that bias incidents have the potential to have extremely high visibility and extremely low visibility. Hate crime identification differs from enforcement of traffic laws, for example, because it can occur under intense public scrutiny.[239] Even if the crime is not reported by the media, other members of the community are likely to know of the crime and pressure police for a bias or non-bias classification.[240] By contrast, with hate crimes not reported to the media and those of which ethnic communities are unaware, there may be extremely low visibility, accompanied by a lack of oversight, as patrol officers fail to identify incidents motivated by bias because of informal departmental norms. These norms may result from pressure within the department to avoid classifying incidents as bias crimes. These pressures may be caused by external forces, like local political leaders who fear that hate crime data may portray their city as "the most bigoted city in America."[241]

V. OFFICIAL PROCEDURE AND EVERYDAY PRACTICES IN THE CONSTRUCTION OF "TRUTH"

In the absence of concrete evidence, the vagueness of police guidelines like those listed above suggests that those guidelines are not what direct the evaluation of hundreds of bias cases each year.[242] The sheer enormity of the task suggests that police officers must have developed organizational routines that aid in their day-to-day classification. The empirical literature on police decision-making and hate crime identification suggests that routines make it easier for police officers to identify evidence of racial, ethnic, religious, and

239. Wexler & Marx, *supra* note 227 (describing the publicity given to racial violence).

240. Jacobs & Fisher, *supra* note 219, at 113 (describing excoriation by the press, protests and demonstrations that may result from police officers' failure to classify an incident as a hate crime). Jacobs fails to acknowledge that identification of an incident as a hate crime may produce similar pressures and changes in procedure.

241. *Id.*

242. From the New York Bias Unit's inception until 1994, the Bias Unit reviewed or investigated over 10,000 possible bias-motivated cases, 5981 of which were eventually classified as bias-motivated. NEW YORK CITY POLICE DEP'T, BIAS INCIDENT INVESTIGATING UNIT ANNUAL REPORT (1994) (unpublished document on file with the author).

other bias-motivated conflict. Routines prescribe how and under what circumstances police officers will ascribe a prejudiced motivation to a crime. Within the police world, this work of classifying bias crime is called "investigation," implying that when they get "to the bottom of the crime" they have found, rather than constructed, the truth.[243] One possible description of the relationship between official procedure and every day practices in the identification of bias crimes, informed in part by Susan Shapiro's study of fact-checkers in newsmagazines, is that the chance and cost of error results in rigid adherence to the rules.[244] In her five week observation of fact-checkers for three national newsweeklies, Shapiro discovered a methodology of checking facts grounded in definitions of "facts" and "errors" used by these researchers. The impossibility of omniscience and the inevitability of error, according to Shapiro, resulted in the differentiation among fact checkers between "inside" errors, which can be detected and "outside" errors which could not have been seen from their particular vantage point.[245] This "perverse" orientation, Shapiro alleges, results in a situation in which fact checkers become more procedure-oriented than outcome oriented.[246] The "truth" mattered less than whether they followed the rules for verification.

Applying Shapiro's study to police truth construction suggests that everyday routines among the police may involve the use of official procedure in a way that those creating it never intended. In Shapiro's study, the rules for verification were intended to make sure that the source was "correct." In practice, however, rules were used to justify a result. The existing literature on the relationship between official procedure and bias crimes fails to answer several questions. Many questions remain regarding officers' use of departmental lists of criteria. Do officers use the criteria as a checklist? Or do they decide whether a crime was bias-motivated and then use the language of the criteria in their reports? If they do use the criteria as a justification for what they have already decided,

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243. Unlike other crimes, in bias crimes the ambiguity of perspective and the importance of context may make truth construction a much more appropriate label than "investigation."

244. Susan P. Shapiro, *This Paper Has Not Been Fact Checked! A Study of Fact Checking in American Magazines*, WORKING PAPER, GANNET CENTER FOR MEDIA STUDIES (1990). For a discussion of how criminal justice personnel construct truth, see CICOUREL, *supra* note 208, at 111–69 (explaining police officers' construction of juvenile delinquents from organizational objectification and verification procedures); Lisa Frohmann, *Discrediting Victim's Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROB. 213 (1991) (describing how prosecutors decide when a rape case is "real").

245. Shapiro, *supra* note 244, at 23.

246. *Id.* at 24.

whom do they use it for? Their bosses? Prosecutors? To protect themselves from lawsuits? What happens in cases when they do not use procedure? Answers to these questions may distill whether the procedure creates the practice or practice developed as a result of the officers' inability to use or their distaste for official procedure.

CONCLUSION

This Note is part of a larger observational study of the police and bias crime classification. Police investigation and classification of hate crimes raises important legal and policy questions, not just regarding how police officers as individuals within organizations manage discretion, but also concerning ground-level enforcers' understanding of laws, the practical implementation of the law on the books, and the efficacy of law as a solution to a problem as difficult as hate crime. Thus, research into the police methods of classification has several implications. It may provide evidence that will allow us to reassess the normative and practical value of the discretion given to street-level bureaucrats like the police. Such police discretion is most often associated with police use of illegally-seized evidence and violations of due process rights because officers are often faced with the tension between maintaining order and violating legal procedural safeguards. The study currently being conducted may show that police discretion is well placed in the area of hate crimes and that maintaining order and enforcing the law are not always antithetical. Hate crime classification may require such a high degree of individual-level decision-making that statutory classification of bias crime is neither feasible nor just. Thus, unlike the Fourth Amendment, hate crime may be an area where enforcing the law and maintaining procedural protection are consistent.

Police methods of bias crime classification have much to say about study of law in general and hate crime laws specifically. Though the Supreme Court has settled the constitutionality of bias crime statutes, bias crimes remain at the intersection of protected speech and unprotected action. Much disagreement in the legal community remains regarding the proper boundaries of what may be considered evidence of bias motivation. This requires the police enforcing bias crime laws to interpret the First Amendment. Meaningful differences between legal interpretation of bias crime legislation, the First Amendment, and police practices may reinforce the idea, at least in the area of hate crimes, that police play much more than a ministerial role in enforcing the law. As a result, judges and lawyers are not the only actors within the criminal justice system with powers of definitive interpretation of the First Amendment. Police classification in this area therefore provides commentary both on the appropriate role for the police both within

the criminal justice system and how law works on the ground. Police officers' interpretations in this area matter, not only in the critical role they play in screening the disputes that come to court, but also in their ability to decide when hate is a crime.

Finally, questioning the enforcement of hate crime law may tell us something about whether hate crime law is effective. This is important because a number of agencies report that while crime in this country is decreasing, hate-motivated violence has grown to epidemic levels and is increasing.[247] By examining the police enforcement of hate crime legislation, we can learn whether police practices effectively address manifestations of bias-motivated violence. Similarly, by closely examining police enforcement in this area, studies of the police may raise questions about whether hatred is an area that the law can police and whether bias crime legislation is the proper vehicle.

247. *See* LEVIN & MCDEVITT, *supra* note 54 (describing the coming crisis and a rising tide of bigotry); ANTI-DEFAMATION LEAGUE, *supra* note 17 (citing rise in anti-Semitic incidents); FEDERAL BUREAU OF INVESTIGATION, *supra* note 9 (reporting increase in hate crimes nationwide); S. POVERTY LAW CENTER, *supra* note 17 (citing rise in violence perpetrated by hate groups). *But see* Jacobs & Henry, *supra* note 173 (arguing that the hate crime epidemic has been socially constructed by the media and victims' advocacy groups).